BEFORE THE TENNESSEE STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF:

K.B.,
Petitioner,

v.

NO. 02-19

BOARD OF EDUCATION of the MEMPHIS CITY SCHOOLS,
Respondent

FINAL ORDER

This case involves K.B., a thirteen-year-old girl who is learning disabled. She had been receiving resource assistance under an IEP in the Shelby County school system. She transferred to the Memphis City School System and, through a series of mistakes in judgment and procedure. she did not receive the services to which she was entitled.

To the school system's credit. it had recognized its mistakes by the time of the hearing and had offered what it believed to be appropriate remedial measures. The parties were communicating well with one another during the hearing and may have established a basis for working together in the future to educate K.B. The issue in the case was reimbursement for private placement decisions made by K.B.'s grandmother/guardian.

The court notes that this is a case that cried out for compromise. Time has not led to that resolution and the court will now choose which party has the stronger case. Unfortunately, it is often the case that a decision favoring one side or the other can lead to a

breakdown in relations between the parties and hinder their efforts to work together in the future to educate the child. The court found K.B. to be an endearing young lady, eager to please, and deserving of the full support of all parties.

WITNESS CREDIBILITY

Often the finder of fact, be it a jury or an administrative law judge, has to form opinions as to credibility on precious little information. Because of the detailed examinations and cross examinations by opposing counsel, however, the court had an opportunity to observe the witnesses and is quite confident in assigning weight to their testimony.

After viewing their demeanor, responsiveness, and whether or not witnesses were forthright in their answers as opposed to evasive or combative, the court FINDS that the witnesses in this case were credible. The court was particularly impressed that school system personnel were willing to admit mistakes.

FINDINGS OF FACT

1. The female student in this case, K.B., was thirteen years old at the time of the hearing. Ex. 1.

2. K.B.'s grandmother, Evelyn Ballentine, has had legal custody of K.B.since August 23, 2001. Tr. 19.

3. K.B. has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Ex. 1.

4. K.B. has been educated in public schools prior to the 2001-3 school year. Tr. 65.

5. During the 2001-2 school year, K.B. transferred to and attended Graves Elementary School. Tr. 74.

6. Ms. Ballentine went to Graves Elementary School the day after she received custody of K.B. to check on her educational program. Tr. 19.

7. The resource teacher at Graves told Ms. Ballentine that she was not aware that K.B. was a student in need of resource services. Tr. 20.

8. Ms. Ballentine had copies of K.B.'s previous IEP.'s and offered them to the resource teacher. Tr. 20.

9. The resource teacher told Ms. Ballentine that she could not accept the copies Ms. Ballentine had in her possession and that she would have to "wait" for the official records to be sent to Graves. Tr. 20.

10. Ms. Ballentine returned to Graves on October 10th and was told that the school had not yet received the records. Tr. 21.

11. Ms. Ballentine reviewed the request that had been sent for K.B.'s records and found that K.B.'s name had been misspelled and her social security number had been copied incorrectly. Tr. 21.

12. At that point, the resource teacher agreed to accept Ms. Ballentine's records.

13. The resource teacher told Ms. Ballentine that she would see K.B. "as it was needed." Tr. 22.

14. Between the beginning of the school year and January, K.B. did not receive the 10 hours per week of resource instruction called for in her I.E.P. Tr. 25-26.

15. At a February I.E.P. meeting, Ms. Ballentine requested that K.B.'s resource hours be reduced because K.B. was not being taught by the resource teacher and was instead being assigned with other students. Tr. 36.

16. K.B. was diagnosed as an auditory learner but there was no evidence that this method of instruction was stressed for her. In addition, the school system inexplicably changed K.B.'s disabling condition to mentally retarded.

17. Following the February I.E.P. meeting, Ms. Ballentine spoke with K.B.'s teachers about oral testing and was told that it took up too much time. Tr. 45-46.

18. Ms. Ballentine repeatedly asked that K.B. be tested to no avail.

19. Ms. Ballentine enrolled K.B. in the Dyslexia Foundation program in January at a cost of $180.00. Tr. 50-51.

20. K.B. attended a Saturday program for dyslexia from January 4th to April 26th.

Tr. 51.

21. In November of 2002, Ms. Ballentine had K.B. evaluated at Team Evaluation Center, Inc. Ex. 1 p. 106.

22. Team recommended that the school address dyslexia, provide additional tutoring to develop phonic skills, and help with her written expressive disorder. Ex. 1, p. 107.

23. Team also diagnosed K.B. as ADHD. Ex. 1, p. 108.

24. K.B. testified and the Court found her to be highly believable, and highly motivated to cooperate and please.

25. K.B. testified that she received little services in resource and actually was often assigned to help other children. Tr. pp 128-29.

26. K.B. testified that she received most of her assignments from the blackboard and had very little oral instruction. Tr. p. 133.

27. Ms. Ballentine followed the Team recommendation and she saw marked improvement in K.B. after she began the private dyslexia program. Tr. 52.

28. Following a recommendation from the Dyslexia Center, Ms. Ballentine enrolled K.B. in Shady Oaks School at a cost of $6250.00.

29. K.B. learned more in her summer program than she did in the previous year in public school. Tr. 143.

30. K.B.'s resource time was reduced in public school because the resource teacher was moved from full time to part time. Tr. 180.

31. In addition to the change in job status, the number of students the resource teacher had to serve increased from 11 to 38 over the course of the school year. Tr. 194.

32. The number of students the resource teacher would serve at one time also increased from three to ten. Tr. 199.

33. At the February IEP meeting the school personnel acknowledged that K.B. was not receiving the agreed to level of instruction and decided to revisit the issue at the end of the school year and try to make up the time in summer school. Tr. 211.

34. At the time extended school year services were being contemplated to make up for lost services during the school year, the extended school program was short of resources.

Tr. 212-213.

35. Because of her learning disabilities, K.B. would have been a candidate for ESY even if there had not been a problem in delivering services to her during the regular school year. Tr. 249.

36. Mr. Steven Rainey testified that the school system had "dropped the ball... tried to pick the ball up... fumbled it again, and then we got a handle on it. Tr. p. 277.

CONCLUSIONS OF LAW

Congress intended for the Individuals with Disabilities Education Act (AIDEA@) (20 U.S.C.A. 1400 *et seq.)* to guaranty children with disabilities a free appropriate public education (AFAPE@). *Renner v. Board of Educ.*, 185 F.3d 635, 644 (6th Cir. 1999). In determining whether or not a public school system has offered a disabled child FAPE, a court must first determine whether the school system has complied with the procedures mandated by the IDEA. *See, Board of Educ. V. Rowley,* 458 U.S. 176, 206, 102 S.Ct. 3034, 73 L.Ed.3d 690 (1982). In return for accepting federal monies, the IDEA requires states to identify, locate, and evaluate all disabled children residing in the state who are in need of special education and related services. 20 U.S.C.A. 1412(2)(C).

School districts receiving federal funding under IDEA must establish an individualized educational plan (IEP) for each child with a disability. 20 U.S.C.A. 1414(a)(5). Congress further defined an IEP as a written statement developed by a professional qualified to deliver the specially designed instruction, the child's teacher, and the parents of the child. *See,* 20 U.S.C.A. 1401(a)(20).

Although technical violations will not automatically invalidate an IEP, this circuit requires administrative law judges and hearing officers to strictly review an IEP for procedural compliance.

Dong v. Board of Educ., 197 F.3rd 793, 800 (6th Cir. 1999); *see also, Doe v. Defendant I,* 898 F.2d 1186, 1190-91 (6th Cir. 1990) and *Burilovich v. Board of Educ. Of Lincoln,* 208 F.3d 560, 567 (6th Cir. 2000). Having assured itself that the process met the requirements of IDEA, a reviewing court or hearing officer must then determine whether the IEP developed by the school system in accordance with the mandated procedures is reasonably calculated to enable the child to receive educational benefits. *Id.* At 206-207. There is no violation of IDEA if the school system has satisfied both requirements. *Rowley* 458 U.S. at 206-207.

Courts are not permitted to substitute their own notions of sound educational policy for those of the school officials. *Thomas v. Cincinnati Bd. Of Educ.*, 918 F.2d 618, 624 (6th Cir. 1990). Instead, courts are to give deference to state and local agencies in choosing the educational methodology *most* suitable to the child's needs. *Rowley* at 458 U.S. 207. Courts should only intervene where a preponderance of the evidence weighs against the local education agency's decision. *Id.* at 206.

Finally, the instant case involves, in part, the guardian's request for reimbursement for private placement, and for providing related services at her own expense. In order for a guardian to unilaterally alter the child's placement or program and then be entitled to relief under the IDEA, she must establish that the public placement or services offered by the school district violated IDEA and that the private placement or service was proper under the act. *Florence Co. School Dist. Four v. Carter,* 510 U.S. 7, 114 S.Ct. 361, 366, 126 L.Ed.2d 284 (1993); *Wise v. Ohio Dept. Of Educ.*, 80 F.3rd 177, 184 (6th Cir. 1996).

The court will first address the procedural violations alleged, and then take up the substantive allegations.

I. PROCEDURAL VIOLATIONS

Under the first prong of *Rowley*, the Court must first determine whether the school system complied with the procedural requirements of the IDEA. The procedural requirements are particularly important because the development and implementation of the IEP are the cornerstones of the IDEA. *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597-97, 98 L.Ed.2d 686 (1988). The strict procedural requirements help assure the quality of the resulting IEP.

In this case, K.B. presented to the school district with an existing IEP from a previous school system. The school system, for reasons known only to it, chose to reject outright the documents K.B.'s grandmother/guardian offered them to help them provide K.B. with a free appropriate public education. Through of series of errors and mistakes in judgment, K.B. was denied services to which she was entitled. Since the denial of services engendered substantive harm to K.B., there has been a denial of a FAPE. *See, Metro. Bd. Of Pub. Educ. V. Guest*, 193 F.3d 457, 464-65 (6th Cir. 1999); *Daugherty v. Hamilton County Schools*, 21 F.Supp.2d 765, 772 (E.D.Tenn. 1998). In such a situation, the court may grant such relief as the court determines is appropriate. 20 U.S.C.A. 1415(e)(2).

II. SUBSTANTIVE VIOLATIONS

A. Reducing K.B.'s hours of resource instruction was a substantive violation.

Once the school system corrected itself and prepared an IEP for K.B., it was bound to follow the program it had adopted. Instead of providing the resource instruction called for in the IEP, the school system modified the program to fit the school system's available resources. Specifically, the number of hours were reduced when the resource teacher was shifted to part time and the quality of the instruction suffered as the number of students the teacher had to serve increased

three fold.

To its credit, the school system offered "makeup hours" to make amends for its lapses. Children, however, are not empty vessels into which we pour an education. They are evolving human beings and the Act requires that school systems address children's needs at the appropriate times.

B. Extended school year services are needed. The amount of regression suffered by a child during the summer months, considered together with the time required to recoup lost skills when school resumes in the fall, is an important consideration in assessing an individual disabled child's need for a structured educational program in the summer months. *Johnson v. Independent School Dist. No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). Demonstrated regression, however, is not the only criterion. The school officials must also consider predictive data based on the opinion of professionals in consultation with the child's parents. *Id.* at p. 1028. The record in this case is convincing. K.B. is a student who needs ESY services in order to avoid regression.

III. REIMBURSEMENT

The IDEA's grant of equitable authority empowers an administrative law judge or hearing officer to order school authorities to reimburse parents for their expenditures on private special education for a child if the administrative law judge or hearing officer determines that such placement was proper under the Act. *School Comm. of Burlington v. Department of Ed. Of Mass.*, 471 U.S. 359, 369, 102 S.Ct. 1996, 2002, 85 L.Ed.2d 385 (1985). Congress intended that disabled children's needs would be met either in public or private institutions through cooperation between the parents and school officials within the IEP process. *Florence County School Dist.*

Four v. Carter, 510 U.S. 7, 12, 114 S.Ct. 361, 364, 126 L.Ed.2d 284 (1993). In cases where cooperation fails, however:

> [P]arents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement. For parents willing and able to make the latter choice, it would be an empty victory to have a court tell them several years later that they were right but these expenditures could not in a proper case be reimbursed by the school officials. Because such a result would be contrary to IDEA's guarantee of a free appropriate public education, we [hold] that Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case.

Florence County School Dist. Four v. Carter, at 510 U.S. 12, *quoting, School Comm. of Burlington v. Department of Ed. Of Mass., supra.*

Parents who make this choice do so, however, at their own financial risk. *Id.* at 471 U.S. at 374. Ms. Ballentine took a considerable financial risk when she transferred her granddaughter to a private school. She made this decision at a point in time where, as Mr. Rainey eloquently put it, the school system had dropped the ball, not once, but twice.

Ms. Ballentine made a correct and legally defensible choice when, in the face of the school system's seeming disinterest in K.B.'s educational requirements, she chose to look elsewhere. To the school system's credit, it has since picked up the ball and evinced a clear willingness to work with K.B.'s grandmother to educate K.B.

Based upon the above findings of fact and conclusions of law, the court:

1. **GRANTS** Ms. Ballentine's request that she be reimbursed in the amount of $7,270.00 for the expenses of Saturday school and private placement.

2, **DENIES** Ms. Ballentine's request that she be reimbursed $6,525.00 for an

additional year at Shady Oaks School.

3. **GRANTS** petitioner's request that K.B.'s records be changed to remove any evidence or notations reflecting that K.B.'s disabling condition is mental retardation.

The court **FINDS** that K.B. is the prevailing party.

This decision is binding on both parties unless the decision is appealed. Any party aggrieved by this decision may appeal to the Chancery Court for Davidson County, Tennessee, or may seek review in the United States District Court for the district in which the school system is located. Such appeal or review must be sought within sixty days of entry of a final order in a non-reimbursement case or three years in cases involving educational cost and expenses. In appropriate cases the reviewing court may stay this final order.

IT IS SO ORDERED THIS 20th DAY OF OCTOBER, 2003.

A. JAMES ANDREWS
ADMINISTRATIVE LAW JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing document has been mailed to:

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